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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

BRYANTEE CHAVON MILLIGAN,

Defendant and Appellant.

B225563

(Los Angeles County
Super. Ct. No. BA353154)

APPEAL from a judgment of the Superior Court of Los Angeles County, John Fisher, Judge. Reversed.

G. Martin Velez, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Stephanie A. Miyoshi and Douglas L. Wilson, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

In an information, the People charged defendant Bryantee Chavon Milligan with selling cocaine (Health & Saf. Code, § 11352, subd. (a); count 1) and possession of marijuana for sale (*id.*, § 11359; count 2). The People further alleged as to both counts that defendant suffered one prior strike conviction (Pen. Code, §§ 667, subds. (b)-(i), 1170.12) and two prior convictions for drug related offenses (Health & Saf. Code, § 11370.2, subd. (a)) and served two prior prison terms (Pen. Code, § 667.5).

A jury found defendant guilty on count 1. As to count 2, the jury found defendant not guilty of possession of marijuana for sale but found him guilty of the lesser included offense of simple possession of marijuana, an infraction. Although defendant thereafter admitted all prior conviction allegations, it later was determined that defendant did not actually suffer a prior strike conviction. Ultimately, the trial court sentenced defendant to state prison for a total of nine years, consisting of the upper term of five years on count 1, plus three years for one of his prior drug convictions and one year for a prior prison term.

On appeal, defendant challenges the sufficiency of the evidence to support his conviction for selling cocaine. He further contends that the trial court erroneously denied his *Marsden*¹ motion and, should we conclude otherwise, that the trial court erroneously denied his motion for a new trial on the ground of ineffective assistance of counsel. Finally, defendant asks us to review independently the sealed transcripts of the in camera hearings on his motion to disclose confidential informant and *Pitchess*² motions. We reverse and remand for a new trial.

¹ *People v. Marsden* (1970) 2 Cal.3d 118.

² *Pitchess v. Superior Court* (1974) 11 Cal.3d 531.

FACTS

A. Prosecution

1. Drug Transaction

On February 19, 2009, a team of Los Angeles police officers were deployed to execute a search warrant at 327 West 58th Street in Los Angeles (the property). The property, a single family dwelling that had been converted into multiple residences, was located in a mixed residential and industrial area. The north side of the street was populated with houses and some apartments. The south side of the street was lined with warehouses and industrial structures. The property was located on the north side of the street in approximately the middle of the block between Grand Avenue and Broadway.³ Officer Leslie Salinas had obtained the search warrant and was in charge of the investigation.

Around 5:00 p.m. an observation post was set up across the street from the property. The purpose of the observation post was to obtain intelligence before executing the search warrant. This was not an undercover operation to buy or observe the sales of narcotics.

The observation post consisted of an unmarked van with tinted windows. The van, which was parked facing east, was staffed by Officer Michael Hofmeyer and his partner, Officer Jurado. It was still daylight outside, and except for the occasional vehicle passing by, Officer Hofmeyer had “a clear and unobstructed view” of the property. Other officers on the team were positioned at nearby locations.

Approximately 15 minutes after setting up the observation post, Officer Hofmeyer saw defendant walk out of the property. Defendant walked through the front yard to a wrought iron fence and had a brief conversation with an African-American man standing on the sidewalk. Following the conversation, Officer Hofmeyer lost sight of defendant,

³ West 58th Street runs east and west, while Broadway runs north and south.

who could have either walked to the back of the residence or alongside the residence. A short time later, Officer Hofmeyer saw a Hispanic man, later identified as Magana, walking in a westerly direction from Broadway. Magana had a brief conversation with the African-American man that had spoken to defendant on the sidewalk along the western part of the property.⁴

During the time that Magana and the African-American man conversed, the latter motioned with his hand in the direction of the property and appeared to motion to Magana to stand on a particular spot on the sidewalk. The African-American man then yelled in the direction of the property, after which defendant walked out of the residence. Defendant walked into the street and casually looked around. He then became more intent on looking inside parked vehicles. He got within inches of the observation van and attempted to look inside through the back and side windows. After defendant had looked into the van, he met up with Magana, who handed defendant an unknown object. Defendant then returned inside the property. Shortly thereafter, defendant came back outside and handed Magana an unknown object, which Magana placed in the right pocket of his jeans jacket. Magana then walked eastbound towards Broadway.

Defendant returned inside the property where he remained for one or two minutes. He then walked outside, got into a car and drove away westbound on 58th Street in the direction of the freeway. At no time while at the observation post did Officer Hofmeyer see anyone other than defendant exit or enter the property.

During his 14 years as a police officer, Officer Hofmeyer observed at least 200 hand-to-hand drug transactions. He characterized defendant's conduct in looking into vehicles as a common counter surveillance technique used by persons selling drugs to determine if the police are watching or if it is safe to proceed. Officer Hofmeyer alerted

⁴ Officer Hofmeyer was parked along the eastern side of the property facing eastbound on the south side of the street. He observed the conversation between Magana and the African-American man by looking through the van's rear and side windows.

the other members of the search warrant team that a possible narcotics transaction had just taken place.

2. Magana's Apprehension

Upon hearing Officer Hofmeyer's broadcast, Officer Salinas, who was positioned nearby to serve the search warrant, detained Magana on the northeast corner of Broadway and 57th Street, about a block and a half away. Officer Salinas, who was accompanied by her partner Officer Brian Cooney, asked Magana if he had anything on him. Magana said he did not and invited the officers to check. Cooney searched Magana and recovered an off-white solid later determined to be cocaine base in his right front jacket pocket. The substance weighed .19 gross grams⁵ and was a usable quality of crack cocaine.

Officers Salinas and Cooney placed Magana in the back seat of their patrol car and drove to the location where members of the team were set up and ready to execute the search warrant. Officer Salinas could not remember the time of Magana's arrest but noted that the police report, which she authored after receiving information from other officers, listed the time of Magana's arrest at 5:25 p.m.

3. Search of the Property

Officers Hofmeyer and Jurado remained in the observation van for 30 to 45 minutes until other members of the team arrived and entered the residence to conduct the search. According to Hofmeyer, the search of the property took place 30 to 40 minutes after defendant drove away.

Officer Salinas searched the property. She seized a clear plastic bag containing a green leafy substance resembling marijuana from the kitchen counter. Later testing confirmed that it was marijuana weighing 12.61 net grams, a usable quantity.⁶ Also

⁵ Its net weight without its packing was .16 grams.

⁶ This was the weight of the marijuana alone minus the plastic bag in which the substance was found.

recovered from that same counter were a razor blade and a digital scale. No narcotics residue was collected from the scale. A second digital scale was found in a kitchen cabinet. According to Officer Salinas, razor blades are used to cut up cocaine base into varying sizes to be sold for different monetary amounts. Digital scales are used to measure the weight of marijuana or other narcotics. No marijuana or crack cocaine paraphernalia or crack cocaine was found at the location. No mail or documents bearing defendant's name and the address of the location were found either.

Officer Salinas did not discern a name connected to the property. The utilities at the location were not in anyone's name. Thus, it was expected that there would be no power. Electricity was present, however, via a power cord observed coming into the house from a door with a lock on it behind the water heater. A heater was found near the couch in the living room.

There was no food at the location and no clothes in the closets. There was a couch in the living room, as well as a blanket and pillow on the floor. There also was a microwave in the kitchen. Based upon her narcotics training and experience, Officer Salinas believed this was an uninhabited "dope-house" used to sell narcotics.

4. Defendant's Arrest

Officer Richard Garcia was in an identifiable police vehicle and accompanied by his partner Officer Giordano when, at approximately 5:30 p.m., he received a radio communication directing him to pull over a Ford Taurus.⁷ Officer Garcia was parked on the south side of 56th Street facing eastbound, when defendant drove by in the Taurus. He was alone. Officer Garcia followed the Taurus, which turned southbound onto Broadway. When Officer Garcia turned right onto Broadway, he lost sight of the Taurus. Officer Garcia continued southbound on Broadway about three streets to Slauson, after

⁷ Officer Garcia had no independent recollection of this time. He referred to the police report, which he did not write, to refresh his recollection. This was an approximation of the time he heard the broadcast.

which he returned to the area where he had been parked when he first saw the Taurus. Officer Garcia radioed that he had lost the Taurus and waited for further instructions. Approximately five minutes had elapsed between the time Officer Garcia followed the Taurus until he returned to his staging area on 56th Street.

About 10 minutes after first seeing the Taurus, Officer Garcia saw the Taurus a second time. This time, the car was traveling westbound on 56th Street. Officer Garcia, who again was parked in an easterly direction, made a U-turn and followed the car, which turned northbound on Figueroa. As Officer Garcia prepared to turn onto Figueroa, he turned on his overhead lights and siren. The Taurus then turned right onto 54th Street and pulled over.

Officers Garcia and Giordano got out of their police vehicle and walked toward the Taurus. As they did so, defendant got out of the Taurus and put his hands up. Defendant turned away from the officers and ran away eastbound on 54th Street and then southbound through the houses on that block. The officers gave chase, never losing sight of defendant. During the foot pursuit, the officers communicated via radio to other units in the area which ultimately apprehended defendant. Approximately four minutes elapsed between the second time Officer Garcia saw the Taurus and the time defendant was caught.

Officer Cooney searched defendant following his arrest. The officer recovered \$660.25 in United States currency from defendant's right front pants pocket.

B. Defense

According to Fatima Contreras (Contreras), a personal banker at Bank of America, the bank issues prepaid VISA cards with a credit limit up to the amount deposited. A customer who wants to purchase a prepaid credit card purchases a cashier's check with cash after providing identification. A cashier's check made payable to Bank of America is generated, after which the personal banker goes to a bank teller to deposit the cash used to purchase the cashier's check. The bank thereafter sends the cashier's check to the

credit card department, which, in turn, issues the prepaid credit card within two to three weeks and mails it to the purchaser.

A cashier's check machine is used to process all of the day's cashier's checks. Each time a cashier's check is printed, the machine records the information printed on the check including the name of the individual handling the particular transaction. At the end of the day when the machine is closed, a long receipt of all the day's transactions by all tellers using the machine is generated.

Defense Exhibit A, a copy of a bank receipt introduced into evidence, showed that a customer named Bryantee Milligan purchased a \$300 cashier's check made payable to Bank of America from Contreras on February 19, 2009 at 5:50 p.m. According to Contreras, the time on the receipt represented the time the cashier's check was printed. The cashier's check, in turn, was used to purchase a prepaid credit card.⁸ Contreras estimated that the entire transaction would have taken "[m]aybe 20, 30 minutes" to complete.

Contreras did not compare Defense Exhibit A to the bank's actual records to ensure its accuracy. She had no independent recollection of the transaction and was not a custodian of records for Bank of America. She had no reason to believe that the document had been altered or that the date and time were incorrect, however. At no time after being subpoenaed to testify by the defense was Contreras told to bring the bank's entire daily receipt containing all other information.

DISCUSSION

A. Sufficiency of the Evidence

Defendant contends the evidence is insufficient to support his conviction for selling rock cocaine to Magana, in that Officer Hofmeyer could not identify the items

⁸ After the defense investigator showed Contreras a copy of the receipt, she entered the information into the bank's system, and a credit card number came up.

defendant and Magana exchanged, there was a period of time between Officer Hofmeyer's observations and Magana's arrest during which the officer lost sight of Magana, and the police did not search Magana before his contact with defendant to ensure that Magana was not already in possession of rock cocaine. We are not convinced.

When the sufficiency of the evidence is challenged, we review the entire record in the light most favorable to the judgment to determine if it contains substantial evidence—i.e., evidence that is reasonable, credible and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Solomon* (2010) 49 Cal.4th 792, 811.) This standard of review is applied regardless whether the People rely primarily on direct or circumstantial evidence. (*Ibid.*) We presume in support of the judgment the existence of any fact the jury reasonably could have deduced from the evidence. (*People v. Vines* (2011) 51 Cal.4th 830, 869.) Thus, we must accept logical inferences that the jury could have drawn even if we would have reached a contrary conclusion. (*Solomon, supra*, at pp. 811-812.)

With regard to defendant's assertion that Officer Hofmeyer could not identify the objects that defendant and Magana exchanged, we note that count 1 "[could] be established by circumstantial evidence and any reasonable inferences drawn from that evidence." (*People v. Meza* (1995) 38 Cal.App.4th 1741, 1746.)

Officer Hofmeyer was a 14-year veteran of the Los Angeles Police Department, who had witnessed in an undercover capacity at least 200 hand-to-hand drug transactions. On the day in question, Officer Hofmeyer fortuitously witnessed such a transaction between defendant and Magana. Officers Hofmeyer and Jurado had set up an observation post on West 58th Street in anticipation of a warrant being executed at the property. No narcotics surveillance or undercover narcotics operation was in progress.

Officer Hofmeyer witnessed Magana speaking to the same African-American man defendant had spoken to earlier. The man motioned toward the property and shouted something, after which defendant walked out of the property. Defendant then proceeded to look into parked vehicles, including the observation van. Officer Hofmeyer

recognized defendant's actions as counter surveillance often undertaken by drug dealers to ascertain if it is safe to proceed with a sale or if they are being watched by the police. After undertaking these measures, defendant spoke to Magana who handed him an unknown object. Defendant returned inside the property. When he came back outside, he handed Magana an object which Magana placed in the right pocket of his jacket. The only object found in Magana's right jacket pocket when he was detained a short while later was rock cocaine.

The jury's determination that defendant had sold this cocaine to Magana is further buttressed by the interior condition of the property as observed when searched. According to Officer Salinas, the structure was a "dope house" used for the purposes of selling narcotics. There was virtually no furniture inside, and there was no clothing or food. On the kitchen counter Officer Salinas found a plastic bag containing marijuana, a razor blade and a digital scale. Another scale was found in a kitchen cabinet. As Officer Salinas noted, razor blades are used for cutting rock cocaine and scales are used for measuring narcotics.

Also significant is the fact that defendant ran from the police after he pulled over and got out of his car. His actions demonstrated a consciousness of guilt. When finally apprehended, defendant had a large sum of money on his person. This was a further indication he had been involved in the sale of illicit drugs. All of these circumstances combined constitute substantial evidence supporting the jury's guilty verdict on count 1.

Defendant, however, argues that Magana may have obtained the cocaine before or after their encounter. The problem with this argument is that it does not negate the fact that defendant gave Magana an object which he specifically placed in his right jacket pocket. The only object found in that particular pocket was rock cocaine. Defendant's unfounded suggestion that Magana may have acquired the cocaine during the brief period of time after Officer Hofmeyer lost sight of Magana and before Officers Salinas and Cooney detained him is utter speculation.

Defendant's reliance on case law in which sales of controlled substances took place through informers is misplaced,⁹ in that these cases are factually inapposite. Magana was not an informant. He acted on his own and was arrested after being found in possession of cocaine. The police had no basis to search Magana ahead of time or to know that he intended to buy rock cocaine. The "fatal gap" in the evidence asserted by defendant simply does not exist.

B. Marsden Motion

After Contreras testified for the defense, defendant made a *Marsden* motion. During an in camera hearing, defendant, in essence, claimed that his counsel failed to investigate his alibi defense¹⁰ properly. Specifically, defendant advised the court that he had asked his trial counsel to subpoena the bank's records months earlier in an effort to prove he had been at the bank when the narcotics transaction took place.¹¹ According to

⁹ See *People v. Blackshear* (1968) 261 Cal.App.2d 65; *People v. Wilkins* (1960) 178 Cal.App.2d 242; *People v. Lawrence* (1959) 168 Cal.App.2d 510, 514-515; *People v. Morgan* (1958) 157 Cal.App.2d 756, 758; *People v. Richardson* (1957) 152 Cal.App.2d 310, 313; *People v. Barnett* (1953) 118 Cal.App.2d 336, 338-339.

¹⁰ Defense counsel asked the trial court to instruct the jury with CALCRIM No. 3400 pertaining to alibi. The trial court granted the request and instructed the jury as follows: "The prosecution must prove that the defendant committed all the charges. The defendant contends the defendant did not commit these crimes and that he was somewhere else when the crimes were committed. The prosecution must prove that the defendant was present and committed the crimes with which he's charged. The defendant does not need to prove that he was elsewhere at the time of the crime. If you have a reasonable doubt about if the defendant was present when the crime was committed you must find him not guilty." During his summation to the jury, defense counsel highlighted this instruction and urged the jury to consider the timeline in this case.

¹¹ Earlier in the proceedings, defendant had exercised his right to self-representation. During a pretrial ex parte proceeding, defendant advised the trial court that he was attempting to obtain records from Bank of America that would show he was at the bank purchasing a credit card when the purported narcotics transaction observed by Officer Hofmeyer transpired. Defendant emphasized that the bank records were crucial to his

defendant, his counsel told him that he had asked the bank for information regarding transactions made on the day in question but that he had been unable to obtain such information. Defendant claimed that the copy of the receipt introduced into evidence as Defense Exhibit A had been obtained from the bank by his girlfriend. As to Messarra's efforts, defendant stated: "But he never, ever, ever went and showed this document down into the bank to get that cashier's check that — that she referred to to show the authenticity and the truthfulness of the evidence in this matter. He never did that. He never requested that. He never subpoenaed any — any of that — this direct information you know. My girlfriend, remember she was here the day of court when I — when you granted my *Pitchess* motion? You know, she had the credit card with her right there. I asked her did we need it? He said no, you know, but she's the one that — that got this receipt [from the bank.]"

Without inquiring of defense counsel, the trial court denied the motion. Immediately following the *Marsden* hearing, the trial court stated:

"I denied the Marsden, but based on my feelings about the case as it stands now I'm — I want to proceed with the case, argument, everything, but I will — if there is a conviction hypothetically before I would sentence I would be requesting either side to do a follow-up with the bank to the extent there can be any verification. And if there is verification that somehow satisfies me that at 5:50 in the afternoon on this date [defendant] was somewhere else other than in police custody I would consider a motion for a new trial." "[I]t's a no lose situation for the defense. I can't do any better than that." "Let's see how it goes. And if it's guilty and you do what I'm asking I will give you leave to sort of reopen." "Just in the sense that if I'm not satisfied of the defendant's

defense, stating, "because my life is on the line, I do not want to go to prison and I just want to make sure — [a]nd I wanted to make sure I had all the material if I had to walk into trial." To, in part, facilitate the acquisition of these records, defendant gave up his right to self-representation. The trial court appointed Alan Messarra (Messarra), who had been acting as standby counsel and who was present at the ex parte hearing, to represent defendant.

guilt to a — where I can sleep on it I’m not going to sentence him. I’ll grant a new trial based on new evidence or whatever.”

“Settled principles guide our resolution of defendant’s claim that the court erred in denying his . . . *Marsden* motion[.]. Once a defendant is afforded an opportunity to state his or her reasons for seeking to discharge an appointed attorney, the decision whether or not to grant a motion for substitution of counsel lies within the discretion of the trial judge. The court does not abuse its discretion in denying a *Marsden* motion “‘unless the defendant has shown that a failure to replace counsel would substantially impair the defendant’s right to assistance of counsel.’” [Citations.] Substantial impairment of the right to counsel can occur when the appointed counsel is providing inadequate representation or when ‘the defendant and the attorney have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result [citation].’ [Citations.]” (*People v. Clark* (2011) 52 Cal.4th 856, 912.)

Defendant contends that during the *Marsden* hearing the trial court should have inquired of Messarra as to why he had not obtained the bank records.¹² We agree. (*People v. Eastman* (2007) 146 Cal.App.4th 688, 695 [“If the defendant states facts sufficient to raise a question about counsel’s effectiveness, the court must question counsel as necessary to ascertain their veracity.”]; *People v. Turner* (1992) 7 Cal.App.4th 1214, 1219 [same].) The trial court’s decision to proceed with argument and revisit the issue if defendant was convicted and made a new trial motion supported by the bank records appears to have been based on its belief that without the bank records, it had no basis on which to conclude that defense counsel’s omission was deficient or resulted in prejudice to defendant. In any event, whether the trial court abused its discretion in denying defendant’s *Marsden* motion need not be resolved. As we explain below, a new trial is warranted in this case.

¹² In his opening brief, defendant stated that “[i]t appears that defense counsel subpoenaed records from Bank of America before trial, but did not obtain these records in response to that pre-trial subpoena.”

C. Motion for a New Trial

In the alternative, defendant argues that if we reject his claim of *Marsden* error, then the trial court erroneously denied his motion for a new trial on the ground that his trial counsel's failure to subpoena bank records constituted ineffective assistance of counsel. As previously noted in footnote 12, *ante*, on appeal, defendant acknowledged that Messarra actually subpoenaed the records before trial. The essence of defendant's complaint, therefore, is that Messarra dropped the ball and did not ensure the receipt of those records in time to introduce them at trial.

Ineffective assistance of counsel is not listed as a statutory ground for a new trial. Nonetheless, the state's high court has held that a defendant may seek a new trial on this ground. (*People v. Fosselman* (1983) 33 Cal.3d 572, 582-583; *People v. Chavez* (1996) 44 Cal.App.4th 1144, 1148; *People v. Taylor* (1984) 162 Cal.App.3d 720, 724.)

A statutory motion for a new trial is addressed to the sound discretion of the trial court, and its ruling will not be disturbed unless a clear abuse of discretion is established. A different analysis is required when a non-statutory motion for a new trial premised on the denial of constitutional rights is made. This requires the application of a two-step process. (*People v. Taylor, supra*, 162 Cal.App.3d at p. 724.)

In the first step, the trial court finds the relevant facts. "On appeal, all presumptions favor the trial court's exercise of its power to judge the credibility of witnesses, resolve any conflicts in testimony, weigh the evidence, and draw factual inferences. The trial court's factual findings, express or implied, will be upheld if they are supported by substantial evidence." (*People v. Taylor, supra*, 162 Cal.App.3d at p. 724, citing *People v. Leyba* (1981) 29 Cal.3d 591, 596-597.)

In the second step, the trial court must decide based upon the facts it has found whether defendant was deprived of his right to the effective assistance of counsel—i.e., whether counsel's performance was deficient and whether the defendant was prejudiced as a result. (*People v. Taylor, supra*, 162 Cal.App.3d at pp. 724-725.) "To the extent that these are questions of law, the appellate court is not bound by the substantial evidence rule, but has "the ultimate responsibility . . . to measure the facts, as found by the trier,

against the constitutional standard” [Citation.] On that issue, in short, the appellate court exercises its independent judgment.’ [Citations.]” (*Id.* at p. 725.)

In order to establish ineffective assistance of counsel, a defendant must establish that his counsel’s performance was deficient under an objective standard of reasonableness and that it is reasonably probably that a result more favorable to defendant would have occurred in the absence of counsel’s failing. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-698 [104 S.Ct. 2052, 80 L.Ed.2d 674]; *People v. Bolin* (1998) 18 Cal.4th 297, 333.) If an ineffective assistance of counsel claim can be decided on the ground of lack of prejudice, the reviewing court need not determine whether counsel’s performance was deficient. (*Strickland, supra*, at p. 697; *In re Crew* (2011) 52 Cal.4th 126, 150.)

In this case, a hearing on defendant’s motion for new trial was held almost three months after the jury returned its verdict. By that time, defense counsel was able to secure the bank records sought before trial. Included was the bank’s non-negotiable reporting copy of the \$300 cashier’s check sold to Bryantee Milligan on February 19, 2009. A computer generated notation on what appears to be the reverse of the reporting copy lists the date and time of the transaction as “02/19/2009 17:01.” The exact same notation is printed on the “Cash In-Debit,” which appears to have been generated by the teller when Contreras deposited the cash used to purchase the cashier’s check. The copy of the actual cashier’s check that was negotiated by the credit card company on February 24, 2009 lists Bryantee Milligan as the purchaser and bears the authorized signature of Contreras.

The People also obtained additional documentation. They introduced the credit card application for Bryantee Milligan at an address other than the property. The application was signed and dated February 19, 2009, and reflects that a deposit of \$300 had been made. The People also introduced copies of credit card statements addressed to Bryantee Milligan at various addresses, none of them being the West 58th Street property, for two different account numbers. There is nothing to indicate which of these

two account numbers, if either, resulted from the credit card application submitted on February 19, 2009.

After listening to argument from both sides, the court took the matter under submission so it could read a transcript of the trial. It subsequently denied defendant's motion for a new trial without expounding on its reasons for doing so.

We cannot comprehend any reasonable basis for defense counsel's failure to obtain the necessary bank records in time for trial. These documents were critical to establishing defendant's alibi defense. As such, counsel's failure to obtain them cannot be explained as trial tactics. (*People v. Lucas* (1995) 12 Cal.4th 415, 437 [conviction subject to reversal on direct appeal due to ineffective assistance of counsel where record "affirmatively discloses that counsel had no rational tactical purpose for [his or her] act or omission"].) His failure to secure the bank records prior to trial was deficient.

The records from Bank of America submitted in support of defendant's motion for new trial were authenticated by the bank's custodian of records. These records showed that on February 19, 2009 at 5:01 p.m. an individual named Bryantee Milligan was at the bank purchasing a cashier's check used to acquire a prepaid credit card. Contreras testified that it takes "[m]aybe 20, 30 minutes" to complete the procedures necessary to apply for a prepaid credit card. Officer Hofmeyer testified that at 5:00 p.m. the observation post was set up across the street from the property and that he saw defendant for the first time when he exited the property 15 minutes later. If confronted with this evidence, the jury would have had to decide if defendant was somewhere else at the time of the narcotic transaction witnessed by Officer Meyer or whether defendant already had returned from the bank when Officer Hofmeyer first saw defendant.

Also, there is a 49-minute discrepancy between the authenticated bank records and the receipt introduced into evidence at trial as Defense Exhibit A. According to Contreras, Defense Exhibit A appeared to be a copy of the receipt generated by the bank's cashier's check machine at 5:50 p.m. Contreras testified that this would have been the time the cashier's check was generated. Although she confirmed that her name was on the receipt and that she had no reason to believe it was inaccurate, she had no

memory of the transaction. Contreras was not the bank's custodian of records, however, and could not verify the accuracy of the receipt. The prosecutor capitalized on this fact, calling the authenticity of this receipt into question during his cross-examination of Contreras and during his closing argument to the jury. Introduction of the authenticated bank records would have changed the playing field, and perhaps the parties would have introduced evidence accounting for the time discrepancy.

Given the unique circumstances of this case, we conclude that the trial court abused its discretion in denying defendant's motion for a new trial.

D. Motion to Disclose Confidential Informant

Prior to trial, defendant filed a motion to disclose the identity of the confidential informant relied upon by police in obtaining the warrant to search the West 58th Street residence. Defendant argued that the informant would establish that he was not the person in control of the residence. The trial court conducted an in camera hearing, after which it denied defendant's motion.

The People must disclose the identity of a confidential informant who is a material witness or suffer dismissal of criminal charges against the defendant. (*People v. Lawley* (2002) 27 Cal.4th 102, 159; *Davis v. Superior Court* (2010) 186 Cal.App.4th 1272, 1276.) "An informant is a material witness if there appears, from the evidence presented, a reasonable possibility that he or she could give evidence on the issue of guilt that might exonerate the defendant." (*Lawley, supra*, at p. 159; *Davis, supra*, at p. 1276.)

Defendant has asked this court to review the sealed transcript of the in camera hearing and ascertain whether the trial court properly ruled on the motion. We have reviewed the transcript and conclude that the trial court indeed applied the proper standard for disclosing the identity of a confidential informant and correctly denied the motion.

E. *Pitchess* Motion

Prior to trial, defendant filed a *Pitchess* motion, seeking to discover the police personnel records of Officers Jurado, Hofmeyer, Cooney, Giordano, Garcia and Salinas. (*Pitchess v. Superior Court, supra*, 11 Cal.3d 531; see Evid. Code, § 1043.) The trial court granted the motion insofar as it sought to discover evidence of false statements and planting evidence with respect to all officers, except Salinas. During a subsequently held in camera hearing, the court ordered the disclosure of some material.

The trial court's decision to deny the *Pitchess* motion as to Officer Salinas was based upon its belief that "Salinas is just getting information from other people." The court further noted that in an off the record conversation, it had asked the prosecutor to be prepared to explain "who would testify to what." On the record, the prosecutor explained that Officers Jurado and Hofmeyer were percipient witnesses to the contact between defendant and Magana. Officer Cooney searched Magana and found the narcotics that defendant purportedly sold him. Officers Giordano and Garcia would be called to testify to defendant's conduct following the sale, his departure from the location and the subsequent stop of defendant's vehicle. The prosecutor made no mention of Officer Salinas testifying.

Despite the prosecutor's pre-trial representations, she called Officer Salinas to testify. Defendant moved to exclude Officer Salinas's testimony. Defendant maintained that if the prosecutor had indicated her intent to call Officer Salinas prior to trial, the court would have granted the *Pitchess* motion as to Officer Salinas as well. Having failed to do so, the trial court had not reviewed Officer Salinas's personnel records.

The trial court stated it would take the motion under submission and allow Officer Salinas to testify. After the jury returned its verdict, the trial court permitted defendant to renew his *Pitchess* motion. He subsequently filed a written motion directed at Officer Salinas. The court stated that it would order a *Pitchess* hearing with regard to Officer Salinas's police personnel records. Working backwards, if records subject to discovery existed, defendant could raise that as another reason warranting a new trial. During a

subsequent in camera hearing, the trial court determined that discoverable material did not exist.

Pursuant to defendant's request, we have reviewed the sealed transcripts of the pre-trial and post-trial *Pitchess* hearings and have determined that the trial court did not abuse its discretion in ruling on defendant's *Pitchess* motions. (*People v. Cruz* (2008) 44 Cal.4th 636, 670; *People v. Moreno* (2011) 192 Cal.App.4th 692, 701.) No additional information was subject to disclosure.

DISPOSITION

The judgment is reversed and the matter is remanded to be tried anew.

JACKSON, J.

We concur:

WOODS, Acting P. J.

ZELON, J.